At the close of the Government's case, the defendant moved to strike the hearsay testimony on the grounds that the Government had failed to establish by independent evidence the existence of a conspiracy and defendant's connection with it. (R. 498) The motion to strike was also directed at certain evidence relating to the information. (R. 504) The motion was denied in entirety. (R. 584) The defendant's motion for judgment of acquittal was also denied. (R. 584, 604) The defendant then rested without presenting any evidence and renewed his motion for judgment of acquittal. (R. 606) This was again denied. (R. 607) A motion for mistrial was made and denied. (R. 614-617)

During the presentation of the Government's case, it was disclosed that an F.B.I. report of an interview with witness Walter Haas was in existence. The trial court inspected the report and allowed defendant to examine the witness regarding the interview. However, the trial judge made no effort to ascertain for himself whether the report should be produced under 18 U.S.C. 3500. The trial court then refused to order its production. (R. 45)

It was also determined that longhand notes had been taken during an F.B.I. interview with Richard Terker. (R. 372) However, the trial court did not rule on whether they constituted a statement within 18 U.S.C. 3500 (e) because of the Government's claim that they had been destroyed in the normal course of business. (R. 383) When the defendant attempted to pursue this point, the trial court requested that the matter be dropped. (R. 389)

The jury acquitted the defendant on Count 2 but found him guilty on the first count. On appeal, the judgment of conviction was affirmed, petitioner's arguments being rejected on all points. As to the hearsay objections, the Court of Appeals sustained the admissibility of the crucial Richard Terker testimony not only on the basis of the so-called co-conspirator rule (upon which the

prosecution and trial court relied) but also in reliance on the "*Hillmon* rule." The court upheld the trial judge's failure to allow defense access to the F.B.I. report on the Richard Terker interview on the grounds that "defendant made no such request." In connection with the F.B.I. report of the Haas interview, the Court of Appeals, although indicating that failure of the trial judge to call agent Clemente of the F.B.I. was probably error in view of this court's holding in *Campbell* vs. *United States*, 365 U.S. 85 (1961), held that such error could not have been prejudicial because, the court said, the prior statement checked out so closely with the witness' trial testimony.

As To The First Question Presented

A De Facto Defendant Called Before The Grand Jury Must Be Apprised Of That Fact And Must Be Informed Of The Nature Of The Proceedings Against Him.

The defendant has, of course, never seen a transcript of the grand jury proceedings. At a pre-trial hearing on a motion to dismiss the indictment, defendant moved that the entire grand jury transcript be certified as part of the record on appeal; the district court refused to do so, certifying only the record of defendant's grand jury testimony. We believe, however, that even that fragment of the transcript and the attendant circumstances, will show rather conclusively that Annunziato was the marked defendant long before an indictment was returned. (If not, we assign the district court's refusal to certify the entire transcript for appeal as error).

The Court of Appeals has informed us that defendant was warned of his privilege — and that it was freely invoked. But such a limited warning is not enough in the present circumstances. A mere witness is unlikely to be asked an incriminating question. A de jure defendant has been placed on guard by the implications of formal charge, and brings to all judicial proceedings the bundle

of rights his status entails. But the de facto defendant stands in a unique and anomolous situation. Marked for prosecution, standing naked of assistance and comfort before the inquisitorial process of the grand jury, he is in a vulnerable position. Without a warning, he will not comprehend the full measure of his rights. Moreover, without knowing the nature and purpose of the proceedings, he will be unable to exercise the privilege intelligently. A seemingly innocuous question may be pregnant with incriminating implications when the scope of the investigation is an enigma.

Nor is it sufficient to say, as did a Court of Appeals in *United States* vs. *Scully*, 225 F.2d 113 (2 Cir. 1955), that this is a matter of ethics and fair play for the prosecutor. Constitutional rights are not part of a game. The books contain too many cases of de facto defendants being summoned before grand juries, to believe serious abuses are not occurring. The wily prosecutor, by delaying formal accusation, has much to gain and nothing to lose if defendant's rights are not real. What purpose could there be in delaying formal accusation? There is only one. To elicit information that could not legally be obtained after de jure status was achieved, *Mulloney* vs. *United States*, 79 F.2d 566 (1 Cir. 1935), *United States* vs. *Lazen*, 115 F. Supp. 674 (S.D.N.Y. 1953), *Powell* vs. *United States*, 226 F.2d 269 (D.C. Cir. 1955), and to lure the unsuspecting citizen into damaging testimony.

There is only one practical safeguard — to require the grand jury to warn all witnesses marked for prosecution of that fact and of the nature and purpose of the investigation. Although the court below asserted the defendant regularly invoked his privilege in response to questions which were incriminating, lack of prejudice should not lightly be assumed. Having not been fully forewarned, defendant may not have been aware of the import of those questions he did answer. Later, denied a transcript of his testimony, fear of his prior statements may become a compelling consideration in not taking the stand — and, as a practical matter, this is always

a most dangerous course as the jury is almost certain to draw an unfavorable inference from it. The Government should not be allowed, through misuse of the grand jury process, so to hamstring the accused.

As To The Second Question Presented

A member of a crime enforcement organization, while not prohibited from serving on a jury, could exhibit such prejudice and bias against the defendant that there would be grounds for a challenge for cause. Moreover, the revelation of membership might prompt the defendant to exercise a peremptory challenge. This right to peremptory challenges, given to defendant by Rule 24(b), Federal Rules of Criminal Procedure, is a means of providing the defendant with the fair and impartial jury guaranteed to him by the Sixth Amendment, and care should be exercised to insure that this right can be employed intelligently. When the trial court exercises its discretion and conducts the *voir dire* without direct assistance of counsel, great pains should be taken to provide counsel an adequate basis for exercising his challenges.

Two other Courts of Appeal, in very similar circumstances, have held that the refusal of the trial judge to allow such a question of the jurors was an abuse of discretion. *Bailey* vs. *United States*, 53 F.2d 982 (5 Cir. 1931); *Beatty* vs. *United States*, 27 F.2d 323 (6 Cir. 1928). In both of those cases, the defendants were being tried for violations of the Prohibition Laws and the requested interrogatories went to involvement with prohibition enforcement societies. It is petitioner's contention that, in essence, our case presents exactly the same basic issue there posed — and that the court below erroneously distinguished the earlier cases by unfairly characterizing the interrogatory here as one aimed at finding out "who is *interested* in law enforcement."

The thrust of the disputed query was not to determine who on the prospective jury panel was "interested" in law enforcement.

Rather, it was to ascertain who among the veniremen had demonstrated what must be considered a somewhat abnormal interest in law enforcement. Most people, regardless of their own law abiding beliefs and tendencies, are content to leave the active tracking and prosecution of violators to local, state and federal authorities — supported as they are by every citizen's tax dollars. Those who go farther than this by actively participating in or monetarily supporting organizations like prosecutors' associations, The National Council on Crime and Delinquency, local crime and delinquency committees, etc., might be suspected, as a group, of being "prosecution minded." Most loyal and intelligent Americans can be described as "anti-communist"; there is in most cases, however, probably a qualitative difference between that antipathy to communist doctrines and sympathizers and that likely to be demonstrated by a rabid member of the John Birch Society. The discovery of just such a difference is exactly what the proffered interrogatory was aimed at.

We urge that while the requested *voir dire* in the two prohibition cases was more narrowly relevant to the issues in those cases, the question refused here was an equally relevant concern of defense counsel. Just as the defense in *Beatty* and *Bailey* were interested in singling out those who had manifested an *abnormal* interest in enforcement of the liquor laws, here the defense attempted merely to obtain the same information as to those who had manifested an *abnormal* interest in all law enforcement. An interest in law enforcement is, of course, laudatory. However, just as a member of the W.C.T.U. would probably have been a less than ideal juror, sterling motives notwithstanding, in a prohibition case — and a John Bircher in a Smith Act prosecution — so too might a member of the F.B.I. Alumni or a contributor to a private organization dedicated to stricter law enforcement have difficulty being impartial in *any criminal* case. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* vs. *Dowd*, 81

S. Ct. 1639, 1642 (June 5, 1961). While the answers to the requested *voir dire* may not have presented the basis of a challenge for cause, it was an important element to be considered by the defense in the use of its peremptory challenges.

The abridgement of the right to peremptory challenge, where granted by statute, is reversible error. *United States* vs. *Shackleford*, 15 How. 588 (1855); *Lewis* vs. *United States*, 146 U.S. 370, 13 S. Ct. 136 (1892); *Gulf etc. R. Co.* vs. *Shaw*, 157 U.S. 348, 15 S. Ct. 341 (1895). The refusal to allow questions of the veniremen which enable the parties to make intelligent use of their peremptory challenges is surely a severe practical abridgement of the statutory right; such abridgement is even more serious when the criminal defendant's jealously guarded right to a scrupulously fair hearing is taken into consideration. The courts have generally recognized that inquiry into germane associations of prospective jurors is proper whether or not the association was such as to warrant a legitimate challenge for cause. *Johnson* vs. *State*, 28 Okla. Crim. 254, 230 Pac. 525 (1924); *Boyle* vs. *People*, 4 Colo. 176 (1878). In the instant case there was not presented any question of unduly prolonging the trial; in refusing to allow a question so calculated to expose possible prejudicial preconceptions and tendencies of prospective jurors, the court erred. A trial court's "broad discretion as to the questions to be asked" on *voir dire* is "subject to the essential demands of fairness." *Aldrich* vs. *United States*, 283 U.S. 308, 310, 51 S. Ct. 470, 471 (1931); Cf. *Sellers* vs. *United States*, 271 F.2d 475 (D.C. Cir. 1959). Such error warrants a new trial.

As To The Third Question Presented

A reading of Judge FRIENDLY's opinion below quickly demonstrates that the issues here involved are not easily susceptible to the "direct and concise" argument called for by this petition. A glance at the statement of the case, however, shows that virtually

the entire case against petitioner was an edifice built of hear-say testimony. The court below held that both the Cohen and Mayhew testimony were admissible under "Professor Morgan's sixth class" — and petitioner does not intend to press these points seriously.

The Richard Terker testimony, though, was crucial to the Government's case. Harry Terker's statement to his son as to his *past* activities, clearly excluded (if alone) by this Court's ruling in *Shepard* vs. *United States*, 290 U.S. 96 (1933), was the *only* evidence in the case that Ammmziato was anything but an unknowing conduit (if, in fact, the envelope contained money); this testimony was obviously extremely damaging and prejudicial.

As to this aspect of the case, petitioner requests the chance to brief and argue at length the following points:

1. The justification for the controversial and oft-criticized *Hillmon* rule.

2. The propriety of the Court of Appeals' cavalier affirmance of the admission of the highly prejudicial "alloy" with the so-called "pure metal."

3. The admissibility of the Richard Terker testimony as statements of a co-conspirator. Here, petitioner's most crucial argument was not even mentioned in the opinion of the court below. It is clear from the evidence that the Cohen and Mayhew conversations took place subsequent to the talk with Richard Terker. Absolutely *no* independent evidence of a conspiracy at the *earlier time* was introduced. It is petitioner's contention that the Richard Terker testimony in this case served the "double duty" forbidden in the conspiracy cases.

4. The facile admission by the Court of Appeals that the requirement that a co-conspirator's statement must be made "in furtherance" of the conspiracy has now reached such a Pickwickian status.

As To The Fourth Question Presented

Although the court below found it unnecessary to reach the question of whether *Campbell* vs. *United States*, 365 U.S. 85 (1961), required the trial court to investigate further the Jencks Act status of the fairly long Haas statement, petitioner contends that the opinion of the *Campbell* majority clearly demands affirmative action, in the interests of justice, on the part of the trial judge.

The Court of Appeals, however, refused to reach the basic question on the strength of its belief that the failure of the defense to see the statement in question could not *possibly* have been prejudicial. The court's reliance on *Rosenberg* vs. *United States*, 360 U.S. 367 (1959), for that holding is, we believe, misdirected.

This Court, in the *Rosenberg* case, held that failure to order production was not prejudicial where defense counsel had obtained the same admission from the witness on cross-examination. The holding in the instant case in effect amounts to the proposition that there was no "material inconsistency" between Haas' two stories. The court in *Jencks*, however, recognizing that trial and appellate judges lacking intimate knowledge of the defendant's case make relatively poor barometers of what is likely to be helpful to the defense, specifically held that the courts were not to pass judgment on the issue of consistency — merely on that of relevancy. The *Rosenberg* opinion did not hedge in any way on this aspect of *Jencks*; the Court held only that a new trial was not warranted where the defense had obtained the same information from the witness. More than merely presenting a problem of prejudicial error, the holding in the instant case resurrects the trial (and/or appellate) court as an intermediate barrier between a criminal defendant and prior statements made by prosecution witnesses; this violates the basic concept behind the decision in *Jencks* — one which was not compromised in *Rosenberg*. Indeed, much more

recently than the decision in *Rosenberg*, this Court has reaffirmed this crucial aspect of its *Jencks* holding.

> "*Whether the statements so relate* to prosecution testimony *is a decision* which is *vested* not in the Government, but *in the trial judge* with full opportunity for appellate review. Once this question has been determined, *whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself.*" (Emphasis added)
>
> *Scales* vs. *United States*, 81 S. Ct. 1469, 1501 (June 5, 1961).

As To The Fifth Question Presented

The Court of Appeals overruled petitioner's contentions on this point because defendant "made no request" for the specific statement in question. The record shows, however, that defendant vigorously sought the handwritten notes taken during the interview with young Terker; that there was a discussion, unrecorded, at the bench; that when it appeared the notes were not available, the defense attempted to have an inference drawn from the destruction of the notes; that the trial court later abruptly cut off the subject from inquiry. See Appendix B to this petition.

This is not a case where counsel went to sleep on the defendant's Jencks Act rights and later attempted belatedly to raise the point. After a somewhat heated exchange on the matter of the notes, the court stepped in and put an end to defendant's quest. Under these circumstances, it is only the "gamesmanship" theory of criminal justice which can punish the accused for counsel's failure to utter the exact talismanic words necessary.

CONCLUSION

1. Each of the questions presented herein poses important questions of federal criminal law which should be decided by this Court.

2. The decision of the Court of Appeals on question (2), concerning the requested *voir dire*, is in conflict with decisions of the Courts of Appeal for the Fifth and Sixth Circuits in *Bailey* vs. *United States*, 53 F.2d 982 (5 Cir. 1931) and *Beatty* vs. *United States*, 27 F.2d 323 (6 Cir. 1928).

3. Although questions of law concerning the admissibility of evidence might not appear, at first blush, worthy of review by this Court, the instant case presents important and far reaching problems which should be settled at this highest level, thereby furnishing uniform rules for all federal trial courts. Among other things, petitioner requests that this Court reevaluate its seventy year old holding in *Mutual Life Insurance Co.* vs. *Hillmon*, 145 U.S. 285 (1892); petitioner contends that part of the holding by the Court of Appeals flies directly in the face of this Court's decision in *Shepard* vs. *United States*, 290 U.S. 96 (1933); and, finally, that the Court of Appeals' alternate holding that certain hearsay testimony was admissible as statements of a so-called co-conspirator presents a clear and dangerous example of growing abuse of the amorphous conspiracy doctrine -- so eloquently pointed out in the concurring opinion by Mr. Justice JACKSON in *Krulewitch* vs. *United States*, 336 U.S. 440, 445 (1949).

4. It is petitioner's contention that the holdings of the Court of Appeals on the "Jencks Act" questions represent grave compromises of both the spirit and letter of this Court's prior decisions in *Jencks* vs. *United States*, 353 U.S. 657 (1957) and *Campbell* vs. *United States*, 365 U.S. 85 (1961).

The writ of certiorari should be granted.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the case numbered and entitled in its docket as No. 26846, "*United States of America, Appellee* vs. *Salvatore Annunziato, Appellant,*" and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated September 8, 1961.

SALVATORE ANNUNZIATO,
Petitioner.

By MORTON DIMENSTEIN, Esq.,
Attorney for Petitioner.

HOWARD A. JACOBS, Esq.,
IRA B. GRUDBERG, Esq.
With him on the Petition.